Living on the edge – how the Poles hang in there whilst the Court deliberates

Karolina Podstawa 2019-05-31T09:00:26

It is always exciting to await a final decision of the Court of Justice of the European Union. The judgement in C-619/18, Art. 258 TFEU infringement case against Republic of Poland, is even more of a case in point, given its relevance for the European Union values and the mechanisms designed to hold the stray Member States to the account.

And yet, this judgement will prove of little constitutional relevance (whilst being admittedly of declaratory relevance as argued in December on this blog by Bogdanowicz and Taborowski). This is due to the fact, partially, that the Polish government believes to have reacted in an efficient manner to the interim measures (which, have not been proven to make a difference as pointed out by the Advocate General Tanchev).

If the Opinion of the AG Tanchev is to be considered indicative of the final judgement, the Court will find, most probably in a restrictive manner, the breach of Art. 19(1) second subparagraph TEU. This conclusion seems inevitable given the context of the insistence of the Polish authorities to 'reform' the Polish democratic system and to purge the highest positions in the country, the Supreme Court reform was not granted by the AG any exonerating treatment, neither as a part of the broadly conceived reform of the judiciary, nor by bringing in the comparison to other legal systems.

The feeling of the certain hollowness in the awaited judgement is directly linked to its anticipated consequences. This piece offers a brief overview of such anticipated implications of the judgement, firstly, from the perspective of the European Union and its rule of law, and, on the other hand, from the perspective of Poland.

1. Framing the European Union Rule of Law in its procedure and substance

Firstly, the judgement, following the voice of the AG is likely to clarify the relationship between infringement procedures and Art. 7 TEU. And so, without much a surprise, and yet with the authority of the member of the Court, the AG stated '(t)here are firm grounds for finding that Article 7 TEU and Article 258 TFEU are separate procedures and may be invoked at the same time' (para. 50). He draws this conclusion on the basis of the wording of the provisions and their divergent purpose in the system of tools. Art. 7 TEU belongs to the realm of political tools, whereas Art. 258 TFEU is a tool of a clearly legal character. This is an important finding, especially if we consider

that the rule of law toolbox is growing. Once the regulation 'On the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States' is adopted, the European Commission will have at its disposal a full arsenal of sanctioning measures, which, once launched parallely, will leave a Member State not much room for manoeuvre. Possibly, this mechanism will be further accompanied by new ones such as the expert oversee mechanisms (see the recent proposal of Udo Di Fabio und Manfred Weber).

Once all these measures are in place and functioning, one can only imagine giving in or exiting as two viable options for a stray Member State.

The bad news is that the AG chose not to consider the violations of Art. 19(1) second subparagraph TEU (and by association of Art. 47 of the EU Charter of Fundamental Rights) in a broader context of the substance of the EU rule of law. This would have been desirable as a next step in the discussions started with the adoption of the 2014 Commission Communication on the Rule of Law framework and more recently through the issuing of the guidance for rule of law evaluation by Member States' national judges in *Celmer* case. Where else if not in the Opinion of an AG to ponder on this highly theoretical notion, the lack of observance of which can lead to rather serious consequences for the Member States?

Unfortunately, thanks to the moderate approach displayed by the AG, the Court is even less likely to do so and will focus on the 'safe' and acceptable notions of judicial independence as also expressed in the *ASJP* judgement and may mention in passing the *Celmer* judgement.

2. The missed opportunity to clarify the position of Art. 47 of the Charter vis-à-vis Art. 19(1) TEU

Whereas it is understandable that the AG has been trying to consider the legal problems of highest relevance, another missed opportunity comes to the forefront. The AG focused so much on proving that the Court's and the Union's competence was not extended as the result of the Commission's claim being based on Art. 47 of the EU Charter of Fundamental Rights that he omitted a rather important information: the relationship between the Charter standard of a right to an effective remedy and to a fair trial on the one hand and on the other hand, the standard that is supposed to be ensured by the Member States under Art. 19(1) second subparagraph, which applies, in fact, beyond application of Union law. This notion is broadly discussed elsewhere in this Symposium, however, I would like to spare a couple of words here to the missing engagement on the part of the AG with this problem.

In his opinion, AG Tanchev, superficially and easily leans on the ASJP judgement stating: 'The Court's judgment in ASJP should not be considered as diminishing the Charter or Article 47 thereof. It seems to be an elegant and coherent solution which respects the limits of the Charter vis-à-vis the Member States, while advancing the EU system of judicial protection and protecting the core values of the EU as established in Article 2 TEU.' (para. 58). The problem of this 'elegant solution' is that it detaches the notion of values from their content elaborated by the Charter, and

misses on the opportunity to connect the two, possibly with the use of the notion of the general principles of EU law (which was referred to by the Court in the ASJP (paras. 15 &16 and para 35).

3. Polish domestic politics and the European Union

From the perspective of the Polish politics, even the declaratory judgement stating infringement on the part of the Republic of Poland will not, most likely, have a far-reaching effect. This is, in part, because the Polish government considers the standard of judicial independence to have been brought in line with the European Union's one by the adoption of the December 2018 Amendment to the Law on the Supreme Court. The law foresees a type of an interim mechanism which would render the adjustment of the retirement age possibly permissible.

Importantly, the discussion of the European Union's 'assaults' on the Polish government in the Polish both state-controlled and the free media has for now subsided, mainly because of the gradual shift of the focus towards the maintenance of power by the Law and Justice government both as the result of elections to the European Parliament and the autumn domestic parliamentary elections. It seems that the 'electoral sausage' served to the Polish voters consists rather in the well-received information related to social assistance (extension of children's benefits or introduction of the additional 13th pension payable at the end of the year), which 'sell' much better than the long-lasting feud with the European Commission and the courts' and judges' supporters protesting months after months in the streets and squares of the Polish cities.

The tone of commentaries is distributed along the usual lines of the media loyalties. The right wing (and state-controlled) media point to the problematic aspect of the external control of the Poles by non-democratic judiciary and even less democratic European Commission (see, for instance, a more recent entry by Tygodnik Powszechny), whereas other outlets usually give a brief account of cases following the Polish Press Agency tone (see, for instance the most recent information about the second of the infringement proceedings or the report on the Opinion of AG Tanchev in Rzeczpospolita) sometimes with a positive encouragement to the active work of the judges (Wyborcza).

The Polish government's position and the legislation reforming the system of the judiciary currently in force remain problematic which is confirmed by the continuous references of questions to the CJEU by Polish courts and the second infringement procedures started by the European Commission in relation to the disciplinary proceedings against judges before the newly created Chamber of the Supreme Court.

In particular, the Polish Courts have been active starting off with the very Supreme Court. We are awaiting the follow-up to the preliminary references in cases C-668/18 in BP v UNIPARTS sàrl, C-625/18 DO v S#d Najwy#szy, C-624/18 CP v S#d Najwy#szy, C-585/18 AK v Krajowa Rada S#downictwa, C-537/17 YV, and C-522/18 D# v Zak#ad Ubezpiecze# Spo#ecznych Oddzia# w Ja#le. Even, as this piece is

written, on 21 May 2019 the same Supreme Court (III CZP 25/19) referred another question to the CJEU pointing to the irregularities of the appointment of judges and the lawfulness of them sitting on the bench. Similarly, the Commission has not laid its arms and started at the beginning of April 2019 another infringement proceeding against Poland in relation to the disciplinary measures introduced by the reforms.

Substantively, these cases concern a variety of legislative contexts ranging from social security through non-discrimination (two of the questions were referred by the judges removed from the office as a result of the implementation of the reform) but share the common denominator of calling the CJEU for help in establishing whether the Polish law acts against Art. 19 para. 1 TEU and Art. 47 of the EU Charter.

Similarly, the ordinary courts have tried to be active in seeking recourse on the European level, however, to a lesser extent (there are only two cases pending before the CJEU: C-558/18 & Case C-563/18. The two cases have been joined by the Court when adjudicating, negatively, whether the cases should be considered following the expedite procedure).

One could risk a hypothesis according to which ordinary courts' activeness has been curbed by the (ab)use of the freshly designed disciplinary proceedings. It must be recalled here that in connection to referral of the preliminary questions to the CJEU, two judges, Ewa Maciejewska (#ód#) and Igor Tuleya (Warszawa) have been subject to the investigation on the part of the Deputy Disciplinary Representative for Matters Concerning Judges of Common Courts. The alleged delict of the two judges and the subject of the investigation was whether 'referral of the questions for a preliminary ruling, in violation of the conditions clearly set out in the provision of Article 267 of the Treaty on the Functioning of the European Union, specifying the procedure for adjudication of the Court of Justice of the European Union regarding the interpretation of treaties and the validity and interpretation of acts adopted by European Parliament institutions, bodies or organizational units has caused a violation of the proper course of proceedings in which the above referral was made' (see, the response of the Disciplinary Representative for Matters Concerning Judges of Common Courts to the letter from the Deputy Director of Amnesty International Massimo Moratti, at p. 2).

Of course, in the light of the increased use of disciplinary proceedings, the judgement in case C-619/18 is important as it will set the tone for all the judgements in the above cases including the ones referring the disciplinary measures undertaken against judges on the basis of the reformed laws. The judgement may even open the road to the claims for compensation against the Polish state in a variety of mobbing cases against problematic judges (see, the report of Amnesty International to the effect and the report of the association of judges Iustita 'Stan Niezale#nego S#downictwa w Polsce', October 2018).

4. Follow up through the use of Art. 260 TFEU and/or Art. 7 TEU – Feeding the Populist Machine?

So far, all the signs indicate that if the C-619/18 judgement of the Court is to be effective and should lead to the permanent change of the legislation and the approach of the government, the Commission must be ready to take the second step and request the imposition of financial penalties under Art. 260 TFEU. This step, however, may be very risky from the perspective of feeding the populist propaganda machine with further arguments against the European Union, which will be surely distributed widely in the state-controlled media. Yet, this step must be encouraged as much less politically and symbolically loaded than pursuit of sanctions via Art. 7 TEU.

Infringement procedure is a clear-cut legal tool, so far regrettably rarely, and incoherently used in the context of values' infringements (see, for instance, the reluctant reaction of the European Commission in the face of broadly discriminatory practices vis-a-vis Roma communities in France, Italy and Czech Republic, see the report here). And yet, this should be the first of the tools to be used (possibly accompanied by financial sanctions). Only once the potential of these instruments is exhausted, the Commission should pursue the last resort measure – Art. 7 TEU mechanism. The reversal of the order, as it seems, deprived the Union institutions of their leverage dangerously putting them in the corner with fewer and fewer secret doors available.

In this context, the slow emergence of the strong European Union judicial community must be praised with the hope that the Polish and European judges will continue to question the Polish legislation and refer questions to the CJEU thus withstanding political pressure. We will also hope that the European Union Member States' judges will find courage and stamina to apply *Celmer*'s dictum and withdraw their trust. If there is any good in this situation, it lies there.
